90-699

No. 90-

In The

Supreme Court of the United States

October Term, 1990

UNITED TRANSPORTATION UNION,

Petitioner,

v.

CSX TRANSPORTATION, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether courts may vacate Public Law Board arbitration awards under Section 3 First(q) of the Railway Labor Act, 45 U.S.C. §153 First(q), by taking issue with the statutorily conclusive findings of the Board as to the practices at issue, thus supplanting the Board as the exclusive agency for resolution of "minor disputes" under the Act.

PARTIES BELOW

The parties listed in the caption, United Transportation Union and CSX Transportation, Inc., are the only parties of record.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner United Transportation Union ("UTU") respectfully requests that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The original opinions and decision of the court of appeals are unreported and are reproduced in the Appendix ("App.") at 4a to 25a. The later order of the court of appeals order amending the original opinions and decision is unreported and is reproduced in the appendix at

1a to 2a. The Memorandum of Opinion of the United States District Court for the Northern District of Ohio, Eastern Division is unreported and is reproduced in the appendix at 26a to 33a.

JURISDICTION

The original decision and opinions of the court of appeals were filed April 26, 1990. The order of the court of appeals changing the original decision and amending the opinions was filed June 19, 1990. UTU timely filed a petition for rehearing and hearing en banc on July 3, 1990. On August 2, 1990, that petition was denied. App. at 3a. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 3 First(p) of the Railway Labor Act, 45 U.S.C. §153 First(p), provides as follows:

> (p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil

suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board: Provided, however, That such order may not be set aside except for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

Section 3 First(q) of the Railway Labor Act, 45 U.S.C. §153 First(q), provides as follows:

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the

clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of title 28, United States Code.

STATEMENT OF CASE

Petitioner UTU filed its petition in the United States District Court for the Northern District of Ohio, Eastern Division to enforce Award Nos. 120 and 121 of Public Law Board[1] 3290 pursuant to Section 3 First(p) of the Railway Labor Act, 45 U.S.C. §153 First(p), on July 31,

[1] The special boards of adjustment authorized by the 1966 amendments to Section 3 Second of the Railway Labor Act, 45 U.S.C. §153 Second (80 Stat. 208, 209) as alternative forums to the National Railroad Adjustment Board are commonly established and referred to as "public law boards" because Public Law 89-456 (*id.*) permitted their creation. *See, Hill v. Norfolk & Western Ry.*, 814 F.2d 1192, 1199 (7th Cir. 1987).

1987. Respondent CSX Transportation, Inc. ("CSX") answered September 23, 1987, and counterclaimed for review of the awards, asking that they be set aside pursuant to Section 3 First(q) of the Railway Labor Act, 45 U.S.C. §153 First(q).

The two awards concerned disputes at Cumberland, Maryland and Akron, Ohio where CSX claimed a right to control traffic through construction areas by using "train orders" and "proceed signals" given by non-UTU personnel, rather than assigning the task of "flagging" oncoming trains to a stop to UTU-represented employees. App. at 4a-5a. Failing adjustment of the disputes, UTU and CSX referred them to the Board for resolution. App. at 6a. The Board found in favor of UTU in both cases, finding in the Akron case the "a *flagging service was* both needed and *essentially being performed*" (emphasis added) and to the same effect in the Cumberland dispute. App. at 6a-7a. CSX had conceded that if flagging is afforded any train, UTU-represented personnel must be used. App. at 28a-29a.

On March 20, 1989, the district court issued an order granting the CSX motion for summary judgment, denying UTU's motion for summary judgment, and vacating Award Numbers 120 and 121 of Public Law Board 3290 (App. at 34a) based upon its Memorandum of Opinion of the same date (App. at 26a-33a). While acknowledging the explicit finding of the Board in the Akron dispute that flagging was "essentially being performed," the district court found that "the award read as a whole indicates that the focus was on the *need* for flagging as opposed to its use" (App. at 33a, n. 5) and vacated the awards as

being outside the jurisdiction of the Board. App. at 33a-34a.

Initially, the court of appeals reversed and remanded the case to the district court with directions to enforce the awards in the decision and opinions issued April 26, 1990 (App. at 4a-25a). At that time, Judge Lively's opinion governed disposition of the case. The reversal and remand with instructions to enforce the Board awards was mandated principally by the Court's decisions in *Union Pacific R.R. v. Sheehan*, 439 U.S. 89 (1978), *Gunther v. San Diego & Arizona Eastern Ry.*, 382 U.S. 257 (1965), and *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. ___, 105 L.Ed. 2d 250 (1990) in holding that the finding of the Board that flagging was essentially being performed was conclusive and that there was room for interpretation of the CSX position that it could operate by train order. App. at 9a-11a, 13a-15a.

However, after consideration of the motion of respondent CSX to amend the judgment to conform to the opinions or, in the alternative, (petition) for rehearing and suggestion for rehearing en banc, the court of appeals issued an order June 19, 1990 effectively making the original majority opinion the dissent, and vice versa (App. at 1a-2a), and affirming the district court's vacation of the awards. By that time, Judge Kennedy's opinion controlled, and affirmed the district court's vacation of the awards. *Union Pacific R.R. v. Sheehan, supra, Gunther v. San Diego & Arizona Eastern Ry., supra,* and *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n, supra,* were not discussed therein. Rather, the opinion cited the operating rule relied upon by CSX, found it granted complete discretion to the carrier in determining whether train

orders would be used, and took issue with the Board's findings, agreeing with the district court that the Board decided the *need* for flagging, rather than whether flagmen were being used. App. at 21a-23a.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENT A QUESTION OF EXCEPTIONAL IMPORTANCE BECAUSE THE DECISION BELOW IGNORES THE TERMS, PURPOSES, AND LEGISLATIVE HISTORY OF THE RAILWAY LABOR ACT, WHICH PROMOTE THE EFFECTIVENESS OF ARBITRATION BOARDS BY MAKING THEIR DECISIONS FINAL AND BINDING, KEEPING THEM OUT OF THE COURTS, MADE CLEAR BY THE COURT IN *Union Pacific R.R. v. Sheehan*, 439 U.S. 89 (1978).

The final decision of the court of appeals, as a result of its June 19, 1990, Order, fails to properly apply the determinative precedent from this Court on the issue of enforcement or review of Railway Labor Act arbitration awards[2], *viz.*, *Union Pacific R.R. v. Sheehan*, 439 U.S. 89, 93 (1978), wherein it is clearly stated that the language of Section 3 First(p), 45 U.S.C. §153 First(p), as to the enforceability [and, consequently, limiting the availability of

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[2] The 1966 amendments to Section 3 Second of the Act, 45 U.S.C. §153 Second (80 Stat. 208, 209) permitting creation of special boards of adjustment (or "public law boards," *see*, n. 1, *supra*) with jurisdiction co-extensive with the Adjustment Board, require conformity to the same procedural standards made applicable to the Adjustment Board by Section 3 First, 45 U.S.C. §153 First. *See, Brotherhood of Ry. and Airline Clerks v. St. Louis-Southwestern Ry.*, 676 F.2d 132, 135 n.2 (5th Cir. 1982).

review with the same standard in 45 U.S.C §153 First(q)] "means what it says." The Court flatly stated therein: "Only upon one or more of these bases may a court set aside an order of the Adjustment Board. . . . The Adjustment Board certainly was acting within its jurisdiction and in conformity with the . . . Act. . . . *We have time and again emphasized that this statutory language means just what it says.*" (*Id.*) (emphasis added).

Further, in *Gunther v. San Diego & Arizona Eastern Ry.*, 382 U.S. 257 (1965), the plaintiff employee was removed from his job as a fireman on the railroad due to reports from the carrier physicians that he was not physically qualified. The Adjustment Board reinstated the plaintiff with back pay after appointing a panel of doctors who found him qualified. The Board construed his contract to require continued employment while physically fit. When the railroad refused to comply and the plaintiff sued for enforcement under 45 U.S.C. §153 First(p), the district court refused to grant relief, holding the award erroneous, and the Ninth Circuit affirmed. *See,* 336 F.2d 543 (9th Cir. 1964).

Justice Black, writing for the majority, took a dim view of the lower courts' refusal to enforce the award stating:

> The District Court found nothing in the agreements restricting the railroad's right to remove its employees for physical disability upon good-faith findings of disability by its own physicians. Certainly it cannot be said that the Board interpretation was wholly baseless and completely without reason. We hold that the District Court and the Court of Appeals as well went well beyond their province in rejecting the

> Adjustment Board's interpretation of this railroad collective bargaining agreement. As hereafter pointed out, Congress, in the Railway Labor Act, invested the Adjustment Board with the broad power to arbitrate grievances and plainly intended that interpretation of these controversial provisions should be submitted for the decision of railroad men, both workers and management, serving on the Adjustment Board with their long experience and accepted expertise in this. . . . *This Court time and again has emphasized and reemphasized that Congress intended minor grievances of railroad workers to be decided finally by the Railroad Adjustment Board.* 382 U.S. at 261-63 (emphasis added).

In its final decision as embodied in the June 19, 1990 Order, the court of appeals here essentially held there was no restriction in the agreement or practices prohibiting CSX from deciding when flagging was to be performed, which is very similar to the holding of the Ninth Circuit in *Gunther, supra,* prior to reversal of its decision by the Court. But the finding of the Board that "flagging was essentially being performed" cannot be said to be wholly baseless and completely without reason. Congress chose arbitration boards, not the courts, to decide these questions, as the Court in *Gunther, supra,* and *Sheehan, supra,* make clear beyond peradventure.

It has been clearly held that the Adjustment Board and Public Law Boards do not lack jurisdiction to *misinterpret* the bargaining agreement or practices. *See, Hill v. Norfolk & Western Ry., supra; Skidmore v. Consolidated Rail Corp.,* 619 F.2d 157 (2d Cir. 1979), *cert. denied,* 449 U.S. 854 (1980). Further, where the claim is that the Board exceeded the scope of its jurisdiction, the issue "is not whether the reviewing court agrees with the Board's

interpretation of the bargaining contract, but whether the remedy fashioned is rationally explainable as a logical means of furthering the aims of the contract." *See, e.g., Walsh v. Union Pacific R.R.*, 803 F.2d 412, 414 (8th Cir. 1986), *cert. denied*, 482 U.S. 928 (1978).

Here the claim of the respondent CSX is not that a term of the collective bargaining agreement was violated, but rather that its own unilaterally promulgated rule regarding the circumstances under which it could operate by train order was misconstrued. What makes this assertion truly ludicrous is that CSX frankly admitted to the Board, as noted by the district court, that if flagging is performed, employees represented by UTU are entitled to the work under the existing practices on the property. App. at 28a-29a.

Perhaps Judge Posner best summarized the Court's views on the question in the opinion in *Hill v. Norfolk & Western Ry., supra*, 814 F.2d at 1194-95, in stating:

> As we have said too many times to want to repeat again, the question for decision by a federal court asked to set aside an arbitration award – whether the award is made under the Railway Labor Act, the Taft-Hartley Act, or the United States Arbitration Act – is not whether the arbitrator or arbitrators erred in interpreting the contract; it is not whether they clearly erred in interpreting the contract; it is not whether they grossly erred in interpreting the contract; it is whether they interpreted the contract. . . . If they did, their interpretation is conclusive. By making a contract with an arbitration clause the parties agree to be bound by the arbitrators' interpretation of the contract. A party can complain if the arbitrators don't interpret the contract – that is, if they disregard the contract and

> implement their own notions of what is reasonable or fair. A party can complain if the arbitrators' decision is infected by fraud or other corruption, or if it orders an illegal act. But a party will not be heard to complain merely because the arbitrators' interpretation is a misinterpretation. Granted, the grosser the apparent misinterpretation, the likelier it is that the arbitrators weren't interpreting the contract at all. But once the court is satisfied that they were interpreting the contract, judicial review is at an end, provided there is no fraud or corruption and the arbitrators haven't ordered anyone to do an illegal act. (Citations omitted).[3]

Moreover, the question here is one of exceptional importance in light of the Court's recent decision in *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. ___, 105 L.Ed. 2d 250 (1989). In that case, it was held that a rail carrier's position of an implied agreement to institute changes in a drug testing program was "not

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[3] Remarkably, a panel the court of appeals itself, including one of the judges in the majority here, recently upheld an arbitrator's award reinstating an employee who drank beer at dinner before returning to work, which displeased it greatly. *See, Dixie Warehouse and Cartage Co. v. General Drivers, Warehousemen and Helpers, Local Union No. 89*, ___ F.2d ___, 133 LRRM 2942 (6th Cir. 1990). In that case, the court of appeals applied what amounts to the National Labor Relations Act, 29 U.S.C. §151 *et seq.*, ("NLRA") analogue to *Union Pacific R.R. v. Sheehan, supra*, contained in the Court's decision in *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29 (1987), explaining that an arbitrator [under the NLRA] has the authority to review penalties unless prohibited by the agreement, making the final decision herein all the more incomprehensible.

obviously insubstantial," and therefore, a "minor dispute" under the Act subject to mandatory arbitration, ousting the courts of jurisdiction. 491 U.S. at ___, 105 L.Ed. 2d at 267, 272. But the Court clearly left the resolution of the carrier's entitlement to continue the practice to the Board. *Id.* at 272.

The holding of *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n, supra,* loses all effect if courts are permitted to determine matters within the *exclusive* jurisdiction of the Board by effectively deciding the issues *de novo* based on an analysis of what issue the Board actually decided "reading the award as a whole," rather than dealing with the statutorily *conclusive* findings of the Board. As the Court noted in *Union Pacific R.R. v. Sheehan, supra,* "[n]ormally finality [of Board decisions] will work to the benefit of the worker . . . and if he wins, he will be spared the expense and effort of time-consuming appeals which he may be less able to bear than the railroad. . . . " 439 U.S. at 94. If the final decision of the court of appeals is permitted to stand, the clear Congressional choice of the Board as the exclusive forum for resolution of "minor disputes" will amount to a nullity. As the Court said in *Union Pacific R.R. v. Sheehan, supra,* "[C]ongress considered it essential to keep these so-called 'minor' disputes within the Adjustment Board and out of the courts. . . . " 439 U.S. at 93 (citing *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R.R.*, 353 U.S. 30, 40 (1957)).

II. THE DECISION BELOW IS IN CONFLICT WITH DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS.

A very recent opinion of the Seventh Circuit is but the latest example of decisional conflict fostered by the

final decision of the court of appeals. In *Chicago & North Western Transportation Co. v. United Transportation Union*, ___ F.2d ___, 134 LRRM 2607 (7th Cir. 1990), the court rejected a carrier appeal claiming a Public Law Board ignored its rights under an agreement and dispensed its private notions of justice, holding that courts may only decide whether the agreement was interpreted, not whether the interpretation is correct. In this case, the Public Law Board found that "flagging was essentially being performed" or to that effect, and CSX admits that if flagging is performed the work belongs to the UTU's members. Yet the court of appeals here, unlike the Seventh Circuit, permitted the district court to review the matter *de novo* and hold that "reading the award as a whole," the finding was directed at the "need for flagging." That is directly at odds with both 45 U.S.C. §153 First(p) and 45 U.S.C. §153 First(q), which clearly state that the findings of the Board are conclusive.

The extent of the conflict among the courts of appeals manifested by the decision of the court of appeals is also evident in decisions of other circuits referred to hereinabove, *e.g.*, *Walsh v. Union Pacific R.R.*, *supra*, wherein the Eighth Circuit held that where the issue is whether a Board acted within its jurisdiction, the question "is not whether the reviewing court agrees with the board's interpretation of the bargaining contract, but whether the remedy fashioned is rationally explainable as a means of furthering the aims of the contract." 803 F.2d at 441; *see also, Diamond v. Terminal Ry. Alabama State Docks*, 421 F.2d 228, 233 (5th Cir. 1970) (same). The court of appeals' reliance on the Fourth Circuit's decision in an NLRA arbitration context in *Clinchfield Coal Co. v. District 28*,

United Mine Workers of America & Local Union No. 1452, 720 F.2d 1365, 1369 (4th Cir. 1983) ("Where . . . the arbitrator fails to discuss critical contract terminology, which terminology might reasonably require an opposite result, the award cannot be considered to draw its essence from the contract"[4]) only emphasizes the conflict.

Certiorari should be granted to resolve the apparent conflicting interpretations of the courts of appeals concerning reviewability of Board awards where the claim is extrajurisdictional action because the mergers of rail carriers that have occurred in recent times have created very large railroad systems, such as respondent CSX, in many instances straddling a number of circuit court boundaries. These conflicting rulings could easily result in the same agreements or practices being interpreted in different ways in different circuits. *See, St. Louis-Southwestern Ry. v. Brotherhood of Ry. and Airline Clerks*, 484 U.S. 907 (1987) (White, J., with whom Brennan, J. joined, dissenting from denial of certiorari).

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[4] As the Court has consistently stated, a collective bargaining agreement (or practice) are not ordinary contracts, nor are they governed by the same old common-law concepts which control private contracts. They cover the whole employment relationship and call into being a new common law – the common law of a particular industry or plant. *See, e.g., Consolidated Rail Corp. v. Railway Labor Executives' Ass'n, supra*, 491 U.S. at ___, 105 L.Ed. 2d at 266.

CONCLUSION

For the foregoing reasons, Petitioner United Transportation Union respectfully asks that the writ be issued as requested herein.

Respectfully submitted,

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NO. 89-3344

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED TRANSPORTATION UNION,

Petitioner-Appellant,

v.

CSX TRANSPORTATION, INC.

Respondent-Appellee.

ORDER

FILED
JUN 19 1990

BEFORE: KENNEDY and GUY, Circuit Judges; and LIVELY, Senior Circuit Judge.

The Court has received the respondent-appellee's motion to amend judgment to conform to opinions or, in the alternative, petition for rehearing and suggestion for rehearing en banc. Upon consideration of the motion, the Court concludes that it is well taken. Accordingly, the previously filed opinions are amended as follows:

(1) The opinion of Senior Judge Lively is amended by deleting the last two lines thereof, which read: "The judgment of the district court is reversed and the case is remanded with directions to enter judgment enforcing the awards."

(2) Circuit Judge Kennedy's opinion is amended by adding at the end of the opinion the following: "Judge Guy having concurred in my dissent to part III of Judge Lively's opinion, it becomes the opinion of the court.

Accordingly, the judgment of the District Court is affirmed."

Entered by order of the Court.

/s/ Leonard Green
Clerk

No. 89-3344

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED TRANSPORTATION UNION, Petitioner-Appellant, v. CSX TRANSPORTATION COMPANY, Respondent-Appellee.	)	ORDER FILED AUG 02 1990

BEFORE: KENNEDY and GUY, Circuit Judges; and LIVELY, Senior Circuit Judge.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

NO. 89-3344

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

NOT RECOMMENDED FOR FULL TEXT PUBLICATION

UNITED TRANSPORTATION UNION, Petitioner-Appellant, v. CSX TRANSPORTATION, INC. Respondent-Appellee.	APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO EASTERN DIVISION FILED APR 26 1990

Decided and Filed _____

BEFORE: KENNEDY and GUY, Circuit Judges; and LIVELY, Senior Circuit Judge.

LIVELY, Senior Circuit Judge. This is an appeal from an order of the district court vacating two awards of a Public Law Board created by agreement of the carrier, CSX Transportation, Inc. (CSX), and the United Transportation Union (UTU), pursuant to the Railway Labor Act. 45 U.S.C. § 151, *et seq.* (the Act). CSX and UTU are parties to a collective bargaining agreement that governs rates of pay, rules and working conditions of employees who work as conductors and trainmen in the CSX system.

I.

A.

This dispute arose from the way in which CSX decided to control rail traffic through areas where

construction work was being done adjacent to track traveled by CSX trains. In two cases, termed the Akron dispute and the Cumberland dispute, CSX chose to control rail traffic through the construction areas by utilizing "train orders" and "proceed signals." A train order is a written notice that requires an engineer to stop the train at a designated location and either proceed through after making a visual observation of the area or wait until the train receives a yellow hand signal or an oral instruction to proceed from an employee at the work site. These proceed signals by hand and oral instructions are presently given by non-UTU represented maintenance of way employees. CSX contends that it has used train orders/ proceed signals since the 1960's when these procedures were first formulated.

CSX chose to rely on train orders and hand signals at the times in question in lieu of a technique known as "flagging." Flagging requires that an employee be positioned in such a way as to stop oncoming trains by signalling them to stop with a flag. Pursuant to the collective bargaining agreement flagging must be performed by UTU-represented employees.

UTU challenged CSX's decision to employ alternate techniques to flagging at both Akron and Cumberland by filing grievances claiming that the methods used amounted to flagging and that therefore the work properly belonged to UTU-represented employees. CSX denied both claims. UTU responded by seeking arbitration of the two disputes.

B.

The parties agreed that UTU's claims should be heard by Public Law Board 3290 (the Board), which was established by agreement in 1982. The Board was created as an alternative to the National Railroad Adjustment Board pursuant to 45 U.S.C. § 153 Second. The agreement creating the Board states that this body "shall not have jurisdiction of disputes growing out of requests for changes in rates of pay, rules or working conditions nor have authority to change existing agreements or establish new rules." The agreement also provides that the Board shall consist of three members – a member affiliated with UTU, a member affiliated with CSX, and a neutral member.

The Akron and Cumberland disputes were treated as companion cases by the Board. Pre-hearing submissions were filed and evidence and argument were presented at a hearing before PLB 3290 on May 9, 1985. UTU argued that the actions undertaken by CSX at both sites amounted to flagging. CSX attempted to show that it had long utilized train orders to control rail traffic in lieu of flagging.

The Board found in favor of the union in both cases. As to the Akron case the Board found that "a flagging service was both needed and essentially being performed. . . . " The Board's primary focus in this case might arguably appear to have centered around the need for flagging. The Board concluded that it "appears to be conceded that if flag protection was necessary that train service employees represented by the Organization [UTU] should have been called for that work." The Board

found for UTU on this basis. In the Cumberland dispute the Board again found that flagging was both needed and essentially being performed. This time the primary focus appears to have been on the question of whether the actions of CSX amounted to flagging. The Board found that trains in this area were being compelled to stop by train orders and then signaled through by either radio or hand signals. The Board found that this process was equivalent to flagging and thus once again held for the union. The Board's findings were issued after an Executive Session held on May 11, 1987. However, the Board dated its two decisions January 31, 1987.

C.

CSX failed to comply with the awards issued by the Board and UTU filed suit to enforce them. CSX filed a counterclaim seeking to have the awards set aside. Both sides then filed motions for summary judgment. The district court granted CSX's motion and denied UTU's motion for summary judgment, and entered an order setting both awards aside.

CSX had claimed for the purposes of summary judgment that the Board's decision should be set aside both for failure to comply with the procedural requisites of the Railway Labor Act and for failure of the awards to conform or confine themselves to matters within the scope of the Board's jurisdiction. The court decided the case on the latter ground – the issue of the Board's conformance with the jurisdiction granted it under the relevant agreement. The court noted in a memorandum opinion that the Board does not have "jurisdiction of disputes growing

out of requests for changes in rates of pay, rules, or working conditions nor have authority to change existing agreements or establish new rules." The court went on to write that the Board accordingly "is not empowered to establish new rules for flag protection of trains passing through construction sites. . . . " Because the Board concerned itself with whether and when flagging protection is necessary it had impermissibly usurped "management's right to determine how its trains should be operated and protected." The district court vacated both awards on this basis.

On appeal UTU argues that the district court committed reversible error in vacating the awards on the ground that the Board had acted outside the scope of its jurisdiction, because "the awards are rationally explainable as a means of furthering the aims of the contract."

II.

A.

In providing for judicial review of Board awards Congress prescribed a very narrow scope of review. The Act directs that "[o]n such review, the findings and order of the [Board] shall be conclusive on the parties, except that the order . . . may be set aside, in whole or in part, or remanded . . . for failure of the [Board] to comply with the requirements of [the Act], for failure of the order to conform, or confine itself, to matters within the scope of [its] jurisdiction, or for fraud or corruption by a member of the [Board] making the order." 45 U.S.C. § 153 First(q).

In *Union Pacific Railroad Co. v. Sheehan*, 439 U.S. 89, 93 (1978), the Supreme Court stated that it has "time and again emphasized that this statutory language means just what it says." A court may set aside a board order only upon one or more of the bases set forth in the statute. In *Sheehan* the court explained the underlying purpose of the Act:

> In enacting this legislation, Congress endeavored to promote stability in labor-management relations in this important national industry by providing effective and efficient remedies for the resolution of railroad-employee disputes arising out of the interpretation of collective-bargaining agreements. See *Gunther v. San Diego & A. E. R. Co., supra; Union Pacific R. Co. v. Price, supra; Slocum v. Delaware, L. & W. R. Co.*, 339 U.S. 239 (1950). The Adjustment Board was created as a tribunal consisting of workers and management to secure the prompt, orderly and final settlement of grievances that arise daily between employees and carriers regarding rates of pay, rules and working conditions. *Union Pacific R. Co. v. Price, supra,* at 611; *Elgin J. & E. R. Co. v. Burley*, 327 U.S. 661, 664 (1946). Congress considered it essential to keep these so-called "minor" disputes within the Adjustment Board and out of the courts. *Trainmen v. Chicago, R. & I. R. Co.*, 353 U.S. 30, 40 (1957). The effectiveness of the Adjustment Board in fulfilling its task depends on the finality of its determinations.

Id. at 94.

In *Gunther v. San Diego & Arizona E. Ry. Co.*, 382 U.S. 257 (1965), the district court refused to enforce an award upon finding no express or implied provisions in the collective bargaining agreement that limited in any way

what the court found to be the railroad's absolute right to remove an employee from service upon certification by the railroad's doctors that the employee was physically disqualified for active service. The court of appeals affirmed. Emphasizing congressional intent that a board's decision in cases involving "minor" disputes be final, the Supreme Court reversed because of the district court's refusal to accept the board's interpretation of the contract. The Court stated:

> Paying strict attention only to the bare words of the contract and invoking old common-law rules for the interpretation of private employment contracts, the District Court found nothing in the agreement restricting the railroad's right to remove its employees for physical disability upon the good-faith findings of disability by its own physicians. Certainly it cannot be said that the Board's interpretation was wholly baseless and completely without reason. We hold that the District Court and the Court of Appeals as well went beyond their province in rejecting the Adjustment Board's interpretation of this railroad collective bargaining agreement.

Id. at 261.

More recently the Court has written:

> "A collective bargaining agreement is not an ordinary contract for the purchase of goods and services, nor is it governed by the same old common-law concepts which control such private contracts. ' . . . [I]t is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. . . . The collective agreement covers the whole employment relationship. It calls into being a new common law – the common law of a particular industry or of a particular plant.' "

Consolidated Rail v. Railway Labor Exec. Ass'n, ___ U.S. ___, 109 S.Ct. 2477, 2485 (1989) (citation omitted). A board decision has the same finality as the decision of an arbitrator. *Gunther*, 382 U.S. at 263. This court has stated that in reviewing an arbitrator's award, a court's duty is "to ascertain whether the arbitrator's award is derived in some rational way from the collective bargaining agreement." *Detroit Coil Co. v. International Ass'n of Machinists & Aerospace Workers, Etc.*, 594 F.2d 575, 579 (6th Cir.), *cert. denied*, 444 U.S. 840 (1979).

B.

The district court found that the Board erred by failing to confine itself to matters within its jurisdiction – the second statutory ground for setting aside an award. The court reached this conclusion on its reading the decision as a determination by the Board that flagging was necessary at the two construction sites. Since the collective bargaining agreement gave CSX the exclusive authority to determine what control mechanism should be employed at construction sites, the court found that the Board had usurped the railroad's right to determine how its trains are to be operated and protected.

CSX contends that the district court clearly acted within its authority in setting these awards aside. The railroad had followed a practice for many years of using train orders to protect obstructed tracks without flagging and had controlled the movement of trains through construction sites by train orders and proceed signals without assigning a flagman to stop the train. Furthermore, the railroad points out that an operating rule (No. 707(f))

expressly permits control of such train movements by use of train orders and proceed signals by non-UTU personnel without flag protection.

CSX argues that the awards in this case "cannot be rationally deduced from the agreement," quoting *Timken Co. v. Local Union No. 1123, United Steelworkers of America*, 482 F.2d 1012, 1015 (6th Cir. 1973), and are not "logically derived" from any provision of the agreement, paraphrasing, *Schneider v. Southern Railway Co*, 822 F.2d 22, 24 (6th Cir. 1987). In *Timken*, this court upheld the district court's refusal to enforce an arbitrator's award because the arbitrator refused to apply a definition contained in the collective bargaining agreement and went outside the record to find a definition that supported his decision. Thus, the arbitrator did not draw the essence of the award from the bargaining agreement.

In *Schneider* we affirmed the district court order enforcing a public law board's award, upon the court's finding that the board's decision "was not without foundation in reason or in fact." 822 F.2d at 25. Recognizing an "extremely limited" scope of review, we stated:

> In order to set aside the Board's decision, it would be necessary to determine that the decision was "wholly baseless and without foundation and reason." (Quoting *Gunther*, 382 U.S. at 264).

Id. at 24.

CSX also relies on our decision in *Sears, Roebuck & Co., v. Teamsters Local Union No. 243*, 683 F.2d 154 (6th Cir. 1982), *cert. denied*, 460 U.S. 1023 (1983). In *Sears* the district court vacated an arbitrator's award upon finding

that the arbitrator had refused to apply unambiguous language in the collective bargaining agreement and had applied a "balancing test" instead. *Id.* at 155.

UTU argues that under the guise of a claim that the Board acted outside of its jurisdiction, CSX actually disputes the conclusive finding of the Board that the railroad's procedures at the construction sites were the equivalent of flagging. It maintains that the district court conducted a de novo review of the facts and made findings directly contrary to those of the Board. Such a procedure is not permitted, and findings of the district court that contradict those of the Board cannot be sustained.

UTU contends that the district court in the present case violated the rule that "in determining whether an arbitrator has exceeded his authority, the agreement must be broadly construed with all doubts resolved in favor of the arbitrator's award." *Walsh v. Union Pacific Railroad Co.*, 803 F.2d 412, 414 (8th Cir. 1986), *cert. denied*, 452 U.S. 928 (1987). The district court recognized that the Board has found that flagging was essentially being performed at the construction sites, but then stated, "[h]owever, the award read as a whole indicates that the focus was on the *need* for flagging as opposed to its use, and, as noted, there was no evidence that flagging was actually performed by anyone." (Italics in original). This finding, according to UTU, clearly exceeded the district court's scope of review.

III.

We agree with UTU that the district court failed to accord the required deference to the Board's findings. The

Board found that the procedures being followed were the equivalent of flagging and that flagging was essentially being performed. Rather than accepting this finding as conclusive, the district court found from reading the award as a whole that the "focus" of the Board was on the need for flagging rather than on its actual use. Such an approach to an arbitrator's award is directly contrary to the rule that it "must be broadly construed with all doubts resolved in favor of" the award.

Read indulgently, the award does not state that the Board found that there was a need for flagging at the construction sites. Rather, it can be read to state that the actions of CSX indicated that the railroad found a need for flagging and followed procedures that were the equivalent of flagging. Thus read the award did not re-write the collective bargaining agreement or impose a new rule requiring flagging through all construction sites. It merely found that under all the circumstances disclosed by the record, flagging in fact, if not in name, was being performed, and UTU employees were not being used.

We are not persuaded by CSX's arguments that it followed procedures which conformed with past practices and were provided for in its operating rules. Rule 707(f) does not provide an alternate to flagging in all circumstances and under all conditions. It states, "When conditions will not permit turning the track over to Work Force(s) . . . or if the nature of the work may cause equipment to foul adjacent tracks, work by Work Force(s) may be performed under traffic without flag protection by use of a train order." This language clearly indicates

that alternative procedures may be substituted for flagging only if certain conditions are met. If these conditions are not met the fact that train orders are used does not eliminate the requirement that flag protection be provided.

The Board found that in the circumstances shown by the evidence in the Cumberland and Akron cases, use of train orders pursuant to Rule 707(f) and applying Operating Rule 93 to control train movements resulted in procedures that were equivalent to, or essentially, flagging. Under different circumstances a different board might well find that use of similar orders and procedures are not the equivalent of flagging. That is a factual determination for each board to whom a dispute is submitted, and as such, it is not subject to the sort of scrutiny applied by the district court in the present case.

The Board did not exceed its jurisdiction by committing the type of errors that led to vacating the awards in *Timken* and *Sears*. On the contrary, the awards draw their essence from the agreement, are rationally explainable, and further a purpose of the agreement – preserving to UTU members the right to be used whenever flagging is employed.

IV.

CSX makes two additional arguments. First, it complains that the Board "did not even prepare the proposed awards for 20 months and the awards were not finally issued until after an executive session was held on May 11, 1987, more than two years after the arbitral hearing closed." Second, CSX contends that the Brotherhood of

Maintenance of Way Employees (BMWE) should have been notified of the proceedings before the Board because BMWE employees performed the contested work (yellow hand signals and oral proceed orders) and would be affected by any decision made by the Board.

A.

CSX relies upon *Jones v. St. Louis-San Francisco Ry. Co.*, 728 F.2d 257 (6th Cir. 1984), in which we held that a board lost jurisdiction over a case by delaying its decision until some 14 months after completion of hearing. The agreement under which the matter was submitted to the board contained a 15-day limit for rendering awards. This court held that the 15-day provision was not jurisdictional in the absence of an explicit statement that the board would lose jurisdiction if it failed to comply with the time limit. The court determined that in the absence of such an explicit statement, " 'the authority of the arbitrator will expire after a reasonable time beyond the period originally fixed for the award has gone by.' " *Id.* at 265, quoting *Local Union 560, International Brotherhood of Teamsters v. Anchor Motor Freight*, 415 F.2d 220, 226 (3d Cir. 1969). The court then held that the board in *Jones* had lost jurisdiction by reason of the 14-month delay, which was found to be clearly unreasonable.

It is possible for a party to waive a time requirement by failing to object to a board's delay in rendering its decision. The *Jones* opinion notes the rule followed by the Second Circuit that "a court should always have the discretion to uphold a late award when no objection to the delay has been made prior to the rendition of the

award or there is no showing that harm was caused by the delay." *Id.* at 265-66, citing *West Rock Lodge No. 2120 v. Geometric Tool Company,* 406 F.2d 284 (2d Cir. 1968). There was no waiver in *Jones* because, as the court found, the grievant had made repeated efforts to have the board issue its decision during the period of delay. Treating these efforts as objections to the board's delay, the court found that the delay harmed the grievant's case. Thus, the party seeking to overturn the award did not waive the 15-day requirement.

This court also considered a delayed board decision in *Schneider,* 822 F.2d at 22 (6th Cir. 1987). In that case the parties had modified the agreement orally to substitute "within a reasonable time" for "thirty days." The court found that the railroad and the union had acquiesced in the slow pace of the board in rendering awards in 512 cases over a 13-year period. Many of these awards were made more than nine months after hearings – the time involved in Schneider's case. Under these circumstances the district court "wisely stayed its hand" and accepted the parties' evident interpretation of reasonableness. *Id.* at 25.

CSX made no objection to the Board's delay in rendering its decision. Thus, *Jones* is distinguishable. See *Hill v. Norfolk and Western Ry. Co.,* 814 F.2d 1192, 1199 (7th Cir. 1987). In adopting the rule of reasonableness in *Jones,* this court stated:

> The determination of reasonableness must be made giving consideration to the surrounding circumstances and any element of prejudice or harm either party suffers. This rule of reasonableness developed to prohibit parties from

> waiting until an award is made and objecting to it on the basis of its untimeliness *only after* they receive an unfavorable decision.

728 F.2d at 265 (citation omitted) (italics in original).

CSX did exactly what *Jones* held the rule of reasonableness was designed to prevent. It voiced no objection to the Board's delay until after the Board rendered its unfavorable decision. Now it makes totally unsubstantial claims of harm by reason of the delay. Under the circumstances of this case we conclude that the Board did not lose jurisdiction over the matter by reason of its delay in rendering a decision.

B.

The Act requires boards to give "due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them." 45 U.S.C. § 153 First(j). The court stated in *Meeks v. Illinois Central Gulf Railroad*, 738 F.2d 748, 751 (6th Cir. 1984), quoting *Allain v. Tummon*, 212 F.2d 32, 35 (7th Cir. 1954), "It is 'well established that an award made by the board in the absence of due notice to the involved parties is void.' " In *Meeks* the board notified the union, but failed to notify the aggrieved employee. In the present case both the aggrieved employees and the union were notified of the hearing and participated. The question is whether the award is void because another union, whose members had given hand and oral proceed signals to trains controlled by train orders, was not notified.

"Involved parties" has been construed to mean parties "likely to be harmed or substantially affected by the

result of the hearing." *Brotherhood of Railway, Airline and Steamship Clerks v. St. Louis Southwestern Railway Co.*, 676 F.2d 132, 135 (5th Cir. 1982). The BMWE does not fit this description. The UTU employees did not seek to replace BMWE employees. The maintenance of way workers were at the construction sites for other purposes, and their occasional "flagging" activities were incidental to their primary occupations. The UTU employees contended that they should have been assigned to the sites for flagging only, not to replace BMWE workers.

Even if the BMWE can be considered an involved party, the failure to notify that union of the proceedings did not necessarily render the awards void. The court held in *Brotherhood of Railway, Airline and Steamship Clerks* that failure to notify a third-party union was a procedural error that did not necessarily void the award. 676 F.2d at 136. In that case the third-party union never objected and the railroad objected only in the court review proceedings "putatively on behalf of the [other union], after making no such objection throughout the regular proceedings under the statute." *Id.* at 137. This court cited *Brotherhood of Clerks* in support of the statement in *Schneider:* "It is well-established that parties to an arbitration may waive procedural defects by failing to bring such issues to the arbitrator's attention in time to allow the arbitrator an opportunity to cure the defects." 822 F.2d at 24. See *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36 (1952) (a procedural objection that was clearly an afterthought not permitted to undo administrative proceedings). We do not believe the absolute *Meeks* rule applies to void arbitration proceedings when the party not notified is neither the grievant, his union or the

railroad, and a favorable award will not result in displacing other employees.

Here, neither CSX nor BMWE ever objected to the failure to notify BMWE. Since an award in favor of the UTU employees would not cause displacement of BMWE-represented employees, this procedural error was waived.

The judgment of the district court is reversed and the case is remanded with directions to enter judgment enforcing the awards.

No. 89-3344
United Transportation Union v.
CSX Transportation, Inc.

KENNEDY, Circuit Judge, dissenting.

I do not disagree with the majority's legal analysis, but rather with the conclusion that the Board confined itself to matters within its jurisdiction. The jurisdiction of the Board is determined by the arbitration agreement between the parties because the "major objective of the Railway Labor Act was to avoid industrial strife by submitting disputes to the adjustment boards for arbitration. The special boards' jurisdiction is limited to the jurisdiction that is conferred thereupon by the agreement between the carrier and the union." *Jones v. St. Louis-San Francisco Ry. Co.*, 728 F.2d 257, 264 (6th Cir. 1984). The agreement between appellee CSX Transportation, Inc. (CSX) and appellant United Transportation Union (UTU) set out three areas for which the Board would not have

jurisdiction: "The Board shall not have jurisdiction of disputes growing out of requests for changes in rates of pay, rules or working conditions nor have authority to change existing agreements or establish new rules."

As the majority acknowledges, the collective bargaining agreement gave CSX the exclusive authority to determine which control mechanism should be employed at the construction sites.[1] For many, many years CSX had used train orders and proceed signals at some construction sites.

Operating Rule 707(f) provides:

> When conditions will not permit turning the track over to Work Force(s) as prescribed in Rules 707(c) and 707(d), or if the nature of the work may cause equipment to foul adjacent tracks, *work by Work Force(s) may be performed under traffic without flag protection by use of a train order.* During the time specified in the train order, all trains will move within the work limits prepared to stop within one-half the range of vision and not proceed beyond the point of work except on yellow hand proceed signal or oral authority from employee in charge of work.

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[1] The majority says that the agreement did not give unqualified discretion to CSX because "Rule 707(f) does not provide an alternative to flagging in all circumstances and under all conditions." It then concludes that if those conditions are not met, use of train orders does not eliminate the requirement for flagging protection. it is important to note, however, that in neither the Cumberland suit nor in the Akron suit was the existence of conditions giving CSX discretion ever contested by the union.

Joint App. at 42 (emphasis added). This rule clearly indicates a difference between the use of a train order and the use of flagmen to protect workers at a construction site. The choice of which to use is vested with CSX. CSX chose to issue a train order under this rule for trains at the Cumberland construction site. It also issued a Superintendent's Bulletin for the Akron construction site under Operating Rule 93, which provides that "[w]ithin yard limits, trains and engines . . . must move prepared to stop within one-half the range of vision, not exceeding twenty (20) MPH unless the main track is known to be clear by block signal indication." Joint App. at 45. Thus, at both sites the trains were required to stop before proceeding either at the direction of a block signal indication or by hand signal or oral authority. In both situations, CSX made the decision not to use flag protection, but rather to protect workers by requiring trains to stop before proceeding or to otherwise verify that the tracks were clear.

It is axiomatic in cases such as this that the arbitrator's award "is legitimate only so long as it draws its essence from the collective bargaining agreement." *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 597 (1960) (quoted in *Norfolk & Western Ry. Co. v. Brotherhood of Ry., Airline and Steamship Clerks*, 657 F.2d 596, 600 (4th Cir. 1981)). Moreover, "[t]he labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law – the practices of the industry and the shop – is equally a part of the collective bargaining agreement although not expressed in it." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-82 (1960).

Examining the Board's opinions in the two cases makes it clear that it decided in appellant's favor not by interpreting the agreement and applicable "shop law," but rather by deciding that flagging was necessary at both sites and that CSX should used the claimants. It is telling to note that the Board framed the question as follows:

> The issue here in dispute, as we view it, *concerns more the contention of the Organization [UTU] that there was a need for flag protection at the construction site* regardless of the type of mechanical equipment or cranes being used by the contractor and that the Claimant or Claimants should have been called for such work.

Joint App. at 13 (emphasis added). The Board thus decided the *need* for flagging, not simply whether non-UTU flagmen were being used.[2] The Board found that the "circumstances of [the] record support the conclusion that a flagging service was both needed and essentially being performed outside the scope of the recognized duties of train service employees." *Id.* As noted above, however, deciding the need for flagmen is vested with the discretion of CSX. *Timken Co. v. Local Union No. 1123, United Steelworkers of America, AFL-CIO*, 482 F.2d 1012, 1015 n.2 (6th Cir. 1973) held that "if the arbitrator under[takes] to, in effect, . . . substitute his own discretion for that of the parties or to dispense 'his own brand

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[2] Both parties concede that if flagmen were being used at the sites, the claimants would be entitled to their awards. I would emphasize that the relevant question for the Board was whether flagmen *were* used, not whether they *should have been* used.

of industrial justice,' the enforcement of the award must be denied" (citation omitted). Here, the Board substituted its discretion with regard to the need for flagmen for that of CSX. As in *Timken*, the Board acted without jurisdiction by exceeding the scope of the arbitration agreement.

While I recognize that interpretation of the arbitration agreement is the unique function of the Board and that its interpretation should not be easily set aside by a reviewing court, the fact that the Board failed to consider either the contract language or the "law of the shop" here expressed in written rules which vested authority with CSX to determine whether to use flagmen or issue train orders at construction sites, is a decision outside its scope of authority. Not only does it not draw its essence from the contract, but it also serves to change a substantive rule regarding flag protection – that is, that CSX no longer has discretion to choose the means of protecting workers. "This Court has consistently adhered to the principle that an arbitrator may construe ambiguous contract language, but lacks authority to disregard . . . plain or unambiguous contract provisions." *Sears, Roebuck & Co. v. Teamsters Local Union No. 243*, 683 F.2d 154, 155 (6th Cir. 1982). *See also Clinchfield Coal Co. v. District 28, United Mine Workers of America & Local Union No. 1452*, 720 F.2d 1365, 1369 (4th Cir. 1983) ("Where . . . the arbitrator fails to discuss critical contract terminology, which terminology might reasonably require an opposite result, the award cannot be considered to draw its essence from the contract").

I would AFFIRM the judgment of the District Court.

No. 89-3344
United Transportation Union v. CSX Transportation, Inc.

GUY, Circuit Judge. I concur in parts I, II, and IV of Judge Lively's opinion, but I dissent from part III and join with Judge Kennedy's resolution of that issue. I believe, as Judge Kennedy concluded, that the Board actually decided the need for flagging rather than the question that was properly before them.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED TRANSPORTATION UNION, Petitioner, v. CSX TRANSPORTATION, INC., Respondent.	CASE NO. C87-1986 Judge John M. Manos MEMORANDUM OF OPINION FILED MAR 20 9 53 AM 89

On July 31, 1987, United Transportation Union ("UTU"), petitioner, filed the above-captioned petition against CSX Transportation, Inc. ("CSX"), respondent, seeking enforcement of two awards made by a Public Law Board convened pursuant to 45 U.S.C. § 153 Second. On September 23, 1987, CSX filed a counterclaim seeking to have the awards set aside. Jurisdiction is proper pursuant to 28 U.S.C. § 1331. The case is before the court on each party's motion for summary judgment pursuant to Fed. R. Civ. P. 56. CSX's motion is granted; UTU's, denied, and the awards are vacated.

I.

On November 2, 1982, UTU and CSX's predecessor agreed to establish a special adjustment board pursuant to 45 U.S.C. § 153 Second, which became known as Public Law Board No. 3290 ("Board"). Such a board is a voluntary creation of railroad carriers and their employees, and is established for the purpose of adjusting and deciding

disputes that cannot be resolved through the usual internal dispute resolution mechanisms. The Board consisted of three members: one representative each of CSX and UTU, and one neutral member.

Awards number 120 and 121 were rendered by the Board in favor of UTU, which represented Yard Foreman R.L. Corley and Brakeman D.R. Kile in each claim, respectively. The awards sustain CSX's obligation to pay each because each should have been, but was not, called to work as a flagman at separate construction sites.

AWARD 120: THE AKRON DISPUTE

Beginning in November 1981, the City of Akron engaged a contractor to rebuild an overhead highway bridge under which CSX's railroad trains passed. CSX issued a Superintendent's Bulletin pursuant to Operating Rule 93[1] which provided that all trains passing under the bridge must stop and ascertain that the track is clear before proceeding.

R. J. Korley filed a claim for pay, contending that flagging protection was work properly belonging to him. Award Number 120 sustained that claim.

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[1] Operating Rule 93 provides in pertinent part:

> Within yard limits, trains and engines (except first class trains) must move prepared to stop within one-half the range of vision, not exceeding twenty (20) MPH unless the main track is known to be clear by block signal indication.

AWARD 121: THE CUMBERLAND DISPUTE

In July, 1982, in Cumberland, Maryland, repair work was being performed on a trestle under which ran railroad tracks. Scaffolding suspended from the trestle created a potential obstruction to CSX's train movements below the trestle. CSX issued a train order pursuant to Operating Rule 707(f)[2] which required trains to stop before the trestle, unless they were radioed that the track was clear, or given a yellow hand signal to proceed, in which case they would pass under the trestle without stopping.

D.R. Kile filed a claim for pay, contending that flagging protection was work properly belonging to him. Award Number 121 sustained that claim.

II.

There is no dispute that CSX has the unilateral authority to dictate the operation and handling of its trains. Likewise, it is conceded that if flagging protection

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[2] Rule 707(f) provides:

> When conditions will not permit turning the track over to Work Force(s) as prescribed in Rules 707(c) and (d), or if the nature of the work may cause equipment to foul adjacent tracks, work by Work Force(s) may be performed under traffic without flag protection by use of a train order. During the time specified in the train order, all trains will move within the work limits prepared to stop within one-half the range of vision and not proceed beyond the point of work except on yellow hand proceed signal or oral authority from employee in charge of work.

is afforded any train, it is work within the exclusive jurisdiction of UTU members.

The affected trains in both awards were subject to operating rules which served to stop them before the construction sites, or which served to allow them to proceed if there was no obstruction. There was no evidence that any train had been flagged to a stop or through the sites, except insofar as non-UTU workers might give "yellow hand signal to proceed."

In the Akron dispute, the Board reached the following conclusions:

> We believe that circumstances of record support the conclusion that a flagging service was *both needed and essentially being performed* outside the scope of the recognized duties of [UTU] employees. . . .
>
> * * *
>
> It therefore seems evident that a hazardous condition existed at the construction site *that required the protection of a flagman.*

Petition Ex. 1 at 5 (emphasis added). In the Cumberland dispute, the conclusion was

> It does not seem that the issue in dispute turns on a question of whether a train was actually flagged to a halt that should govern whether flagging protection was required or being provided by [non-UTU] employees. . . .
>
> * * *
>
> it seems evident that the trains . . . were subject to being flagged through the construction site,

> with the [non-UTU] work force employees permitting trains to proceed by either radio or hand communication signals.

Petition Ex. 2 at 1-2. Thus, the Board decided, in both awards, that CSX ought to have chosen to protect its trains by flagging. Then, over-applying CSX's concession that flagging is work of the UTU, the Board reasoned that each claimant should have been called to flag the site that should have been thus protected.[3]

III.

When an award of a Public Law Board is rendered, it is "final and binding upon both parties to the dispute. . . . Compliance [is] enforceable by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards [rendered under 45 U.S.C. § 153 First]." 45 U.S.C. § 153 Second.

Such awards may only be set aside under § 153 First (p), or set aside or remanded under § 153 First (q), upon three limited grounds: failure to comply with the procedural requisites of the Railway Labor Act, failure of the award to conform or confine itself to matters within the scope of the board's jurisdiction, or fraud or corruption of a board member. The last ground is not alleged. Instead,

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[3] The Board overstated CSX's concession thusly: "It also appears to be conceded that if flag protection was necessary that [UTU] employees . . . should have been called for that work." CSX Motion for Summary Judgment Ex. A. at 6. As shall be shown, the Board was without jurisdiction to decide "if flag protection was necessary." *See* post at 6.

CSX presses three contentions; one respecting a procedural irregularity and two claiming exceeded jurisdiction. UTU denies that any of the grounds for review are sustainable. Because the court finds that the awards must be set aside on the ground that the Board has exceeded its jurisdiction by imposing operating rules upon CSX, the other contentions of CSX are not addressed.[4]

The decisions of Public Law Boards are to be accorded the same finality as those of arbitrators rendering decisions under collective bargaining agreements. *Gunther v. San Diego & Arizona E. Ry. Co.*, 382 U.S. 257, 263, 86 S. Ct. 368, 372 (1965) (citing *Brotherhood of R.R. Trainmen v. Chicago River and Indiana R.R. Co.*, 353 U.S. 30, 77 S. Ct. 635 (1957)).

> "In the arbitration context, an award 'without foundation in reason or fact' is equated with an award that exceeds the authority or jurisdiction on [sic] the arbitrating body. To merit judicial enforcement, an award must have a basis that is at least rationally inferable, if not obviously drawn, from the letter or purpose of the collective bargaining agreement. . . . The requirement that the result of arbitration have 'foundation in reason or fact' means that the award must, in some logical way, be derived from the wording or purpose of the contract."

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[4] CSX has claimed that the rendering of the awards was so long delayed that the Board lost jurisdiction, and that the Board's failure to notify non-UTU Maintenance of Way workers of the proceedings was a fatal irregularity under the requirements of 45 U.S.C. § 153 First (j). UTU has answered that all the grounds claimed are meritless, and that these two have been waived.

Schneider v. Southern Ry. Co., 822 F.2d 22, 24 (6th Cir. 1987) (quoting *Brotherhood of R.R. Trainmen v. Central of Georgia Ry. Co.*, 415 F.2d 403, 411-12 (5th Cir. 1969), *cert. denied*, 396 U.S. 1008, 90 S. Ct. 564 (1970)).

The awards at issue here are not so derived. They "fall within [one] of the three limited categories of review provided for in the Railway Labor Act," *Union Pac. R.R. Co. v. Sheehan*, 439 U.S. 89, 93, 49 S. Ct. 399, 402 (1978); that is, they fail to confine themselves to matters within the scope of the Board's jurisdiction. The agreement establishing the Board provides, in pertinent part, that it

> shall have jurisdiction only of the claims and grievances . . . arising out of the interpretation of agreements governing rates of pay, rules or working conditions. *The Board shall not have jurisdiction of disputes growing out of requests for changes in rates of pay, rules, or working conditions nor have authority to change existing agreements or establish new rules.*

CSX Motion for Summary Judgment Ex. 4 at 1(B) (emphasis added).

The Board is not empowered to establish new rules for flag protection of trains passing through construction sites; that assessment is concededly the exclusive province of CSX. And the Board did not find that CSX had determined the necessity for flag protection. Instead, the Board's decisions are a usurpation of the management's right to determine how its trains should be operated and protected. If CSX *decides* that flagging is, in the Board's words, "needed" or "required," UTU workers must be assigned the task. If, as happened here, CSX decides that its trains are adequately protected by means other than

flagging, and in fact does not use flagging,[5] the Board has no further say in the matter.

Accordingly, CSX's motion for summary judgment is granted, UTU's is denied, and Public Law Board No. 3290 Award numbers 120 and 121 are vacated.

IT IS SO ORDERED.

/s/ John M. Manos
UNITED STATES
DISTRICT JUDGE

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[5] In Award Number 120, the Board did find that flagging was *"essentially* being performed," *see* ante at 3; however, the award read as a whole indicates that the focus was on the *need* for flagging as opposed to its use, and, as noted, there was no evidence that flagging was actually performed by anyone.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED TRANSPORTATION UNION,	)	CASE NO. C87-1986
Petitioner,	)	Judge John M. Manos
v.	)	ORDER
CSX TRANSPORTATION, INC.,	)	FILED MAR 20 89
Respondent.	)	

Pursuant to the Memorandum of Opinion issued in the above-captioned case this date, CSX Transporation, Inc.'s motion for summary judgment is granted, United Transportation Union's is denied, and Public Law Board No. 3290 Award Numbers 120 and 121 are vacated.

IT IS SO ORDERED.

/s/ John M. Manos
UNITED STATES DISTRICT JUDGE